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In The

Supreme Court of the United States

October Term, 1975

No. 75-1043

LUIS A. LEBRON, JR.,

Petitioner,

vs.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

LUIS A. LEBRON, JR.,

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THE UNITED STATES SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Luis A. Lebron, Jr. petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 25, 1975, Docket Numbers 75-6054 and 75-6055.

The judgment affirmed the order and decision of the District Court denying the two applications for collateral attack upon the petitioner's military court martial convictions.

OPINIONS BELOW

The judgment of the Court of Appeals is set forth as Appendix A (1a).

The memorandum opinion of the Court of Appeals attached to the judgment is not reported, and is set forth as Appendix B (3a).

The opinion of the District Court, reported at 392 F. Supp. 219, is set forth as Appendix C (4a).

The opinion of the United States Air Force Court of Military Review, with regard to the assault charge, is reported at 46 CMR 1062.

The decision (without opinion) of the United States Court of Military Appeals, with regard to the assault charge, is reported at 46 CMR 1323.

There is no military appellate court opinion or decision with respect to the narcotics case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Fifth Amendment right to due process, the Sixth Amendment right to a fair trial, and the

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Fourth Amendment right to protection against unreasonable search and seizure.

Also involved in this appeal are several statutory provisions of the Uniform Code of Military Justice, to be found in Title 10 of the United States Code.

Article 134 of the UCMJ (10 U.S.C. §934) — the general article — prohibits and punishes, as follows:

> ". . . all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces . . . ."

Article 73 of the UCMJ (10 U.S.C. §873), labeled petition for a new trial, speaks solely of a petition "after approval of the convening authority." The Court of Military Review was correct when it stated that the Code of Military Justice ". . . is silent as to the method by which he can obtain the relief before the first review." 46 CMR at 1065.

Article 52(a)(2) of the UCMJ (10 U.S.C. §852(a)(2)) provides for conviction by a two-thirds (2/3) vote of the jurors.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. §1254(1).

ISSUES INVOLVED

Was the petitioner denied due process at his court martial proceeding when his motion for a new trial was not submitted by the commanding officer to the trial court for its decision, and was unilaterally denied by the commanding officer on the basis of his own ex parte investigative report?

Did the lower court err, contrary to the holdings of this Court in *Secretary of the Navy v. Avrech*, 418 U.S. 676, and *Parker v. Levy*, 417 U.S. 733, when they held that Article 134 of the UCMJ (the catchall article) could be the statutory basis of a charge of use and possession of narcotics in a court martial proceeding?

Should Article 52(a)(2) of the Uniform Code of Military Justice, which permits a court martial conviction by only a two-thirds (2/3) vote of the jury, be declared unconstitutional, and should unanimity of a jury's vote be constitutionally required in a court martial proceeding?

Is there a violation of the Fourth Amendment to the United States Constitution in the military court martial system, which permits the issuance of search warrants, based upon oral and unsworn supporting statements, and allows the admission of evidence so seized?

PRELIMINARY STATEMENT

In February 1971, Lebron was convicted at a court martial for possession and use of a narcotic drug, in violation of Article 134 of the Uniform Code of Military Justice (10 U.S.C. §934).

The Judge Advocate General of the United States Air Force examined the trial record, and directed that there be no appellate review by the Court of Military Review (Docket ACM 20846). As such the District Court found that there was no jurisdictional bar to bringing the collateral attack.

The second court martial (December 1971) involved a conviction for assault upon a fellow serviceman, after a jury trial, at the Keesler Air Force Base, Mississippi, in violation of Article 128 of the Uniform Code of Military Justice. The Air Force Court of Military Review affirmed the judgment of conviction and sentence (46 CMR 1062), and the Court of Military Appeals denied leave to appeal (46 CMR 1323). Lebron was in actual custody when the collateral proceedings were commenced, and the District Court found no jurisdictional problem.

In a lengthy opinion and decision the District Court fully considered each of the issues of law which were subsequently raised in the Court of Appeals, and are again raised in this petition (4a; also at 392 F. Supp. 219). The Court of Appeals wrote a brief memorandum opinion (App. B, 3a), attached to the judgment of affirmance, in which it discussed only two of the four issues raised.

Shortly after the completion of the assault trial, but before the commanding officer had approved the findings of the court martial, Lebron filed an application for a new trial based upon newly discovered evidence — the confession of a fellow serviceman. The commanding officer did not refer this application for a new trial to the military trial judge, but instead directed his Staff Judge Advocate to conduct an ex parte investigation into the merits of this application. Subsequently in reliance upon the ex parte report of the Staff Judge Advocate, the commanding officer denied the application for a new trial, and approved the findings of the court martial. The opinion of the District Court shows that the District Judge was obviously disturbed by the failure of the base commanding officer, and his Staff Judge Advocate, to refer this application for a new trial to the military trial judge. However, after full discussion, the District Court did not find a due process or other constitutional violation, for the District Judge held that the petitioner was not constitutionally entitled to an evidentiary hearing on his new trial application. Ironically the Court of Appeals did not discuss this issue in its memorandum opinion, even though the entire oral argument was limited to this point.

Both the District Court and the Court of Appeals brushed aside the petitioner's contention that as to his narcotics conviction, which was brought pursuant to the "general article" (Article 134), that article of the Code was unconstitutionally void and vague as the basis for supporting a narcotics charge and conviction. The District Court quoted from the concurring opinion of Mr. Justice Blackmun in *Parker v. Levy*, 417 U.S. at 763, in which Mr. Justice Blackmun wrote that drug offenses

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are "of a sort which ordinary soldiers know, or should know, to be punishable." The Court of Appeals did not write on this point.

Both the District Court and the Court of Appeals rejected Lebron's contention that Article 52(a)(2) of the Uniform Code of Military Justice, which permits conviction by a vote of only two-thirds (2/3) of the jury, was unconstitutional, in view of Mr. Justice Powell's concurring opinion in *Johnson v. Louisiana*, 406 U.S. 356, 366, 369-370. In this regard the Court of Appeals wrote:

> "There is no authority for appellant's proposition that unanimity is required in military trials. Again, the special position of the military requires that its procedures be respected, save when they unavoidably clash with the Constitution. The Supreme Court has not held that unanimous juries are required for any particular tribunal."

Both the District Court and the Court of Appeals rejected the petitioner's contention that with respect to the narcotics case, there was no Fourth Amendment constitutional violation because of the fact that the authority to search and seize (analagous to a search warrant) was secured on the basis of oral and unsworn representations, and was not required to be done on the basis of written and sworn representations. In this regard the Court of Appeals wrote:

"The Fourth Amendment requires that warrants issue only upon probable cause; it does not specify written affidavits or sworn testimony. Given the military's unique status within the federal judicial system, the engraftment of federal civil procedures upon military courts should not be mandated unless the military procedures are so capricious as to deny the serviceman a fair hearing. Appellant does not challenge either the accuracy of the Special Agent's information or the basic fairness of the procedures employed."*

REASONS FOR GRANTING THE WRIT

I.

It is obvious that Lebron was denied due process, with respect to the assault case, when the commanding officer (he was the charging party) completely by-passed the trial Court, when he himself denied the new trial application (without referring it to the trial Court). The motion for a new trial like any other pre-trial, mid-trial, or post-trial proceeding, should be decided only by the trial Court. After all this is a trial court proceeding, with a charging party and a defending party. It is not for the charging

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* In the District Court the petitioner did challenge the accuracy of the Special Agent's information. This argument was not made in the Court of Appeals because petitioner's counsel believed it was a factually oriented issue which the Court of Appeals was not prepared to evaluate. However, we do not concede the accuracy of the information. At this point we believe it is of no concern, and does not diminish from the force of our Fourth Amendment argument.

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party to decide what rights, if any, the defending party has or has not. For that we have an independent and impartial trial judge.

Apparently there are no cases on point. The statute itself — Article 73 of the Uniform Code of Military Justice — just does not begin to address itself to this very problem. That statute is addressed to the problem posed by a new trial application while the matter is on appeal. By now major aspects of the Bill of Rights have been applied to the military justice system. Certainly the due process clause has been so applied. Yet due process is denied a soldier when the commanding officer can by-pass the military court itself, and decide with finality an important aspect of the trial court proceedings. Due process requires a healthy respect for the role and independence of the military trial judge. Due process is denied when the role of the judge has been diminished or ignored. Even though there is a dearth of reported decisions, the problem posed by a motion for a new trial is really not unique. It is in order for this Court to resolve this issue, and to hold that only the trial Court itself can decide such a motion.

II.

The opinion of this Court in *Secretary of the Navy v. Avrech*, 418 U.S. 676, and *Parker v. Levy*, 417 U.S. 733, sustained the constitutionality of Article 134 of the Uniform Code of Military Justice as it applied to "aspects of the conduct of members of the military which in the civilian sphere are left unregulated." The statute was clearly intended to apply to conduct which was peculiarly military, and not otherwise

capable of statutory definition. It is apparent from the reading of the opinions of this Court in *Levy* and in *Avrech* that this Court did not wish to sustain a statute as it applied to conduct which was essentially a common law offense or a civilian offense, and which was capable of definition. As such it is apparent that this Court did not intend that Article 134 could constitutionally apply to a narcotics conviction. In fact none of the other eight members of this Court joined Mr. Justice Blackmun in his concurring opinion in which he stated that drug offenses are "the sort which ordinary soldiers know, or should know, to be punishable." 417 U.S. at 763. It is in order for this Court to correct the misinterpretation of its opinions in *Parker* and *Avrech*, and to state with clarity so that the lower courts will understand that Article 134 can only be applied to peculiarly military related offenses, and cannot be applied to the civilian type offenses.

III.

In view of the decision of this Court in *Johnson v. Louisiana*, 406 U.S. 356, and more particularly the concurring opinion of Mr. Justice Powell, 406 U.S. at 369-370, it is appropriate for this Court to decide whether the military court system should be allowed to continue with the two-thirds (2/3) jury vote in order to convict a soldier defendant. Unanimity is the rule in the federal court, and is not required of the state courts only because of their own independent role. The military court system is not subject to the same independence as is the court systems of the various states. The military court system has been created by Congress, and is part of the national court system. As such it should be subject to the same rule of unanimity as is federal court juries.

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It is in order for this Court to resolve this issue for it affects hundreds, even thousands, of military court trials annually. A resolution of this issue would be healthy and raise the standards of military trials to that high level enjoyed by civilian peers.

IV.

The military court system tolerates the issuance of search warrants (called authority to search and seize) on the basis of oral and unsworn statements and representations of investigating agents, and does not require that written and sworn statements be submitted to the issuing authority. Obviously this practice is at sharp variance with the stringent requirements of this Court with respect to search warrants issued in both the federal courts and the state courts. This Court has gone to great length in numerous decisions to spell out what must be found within the four corners of an affidavit before a search warrant may be issued. The names of these decisions are legendary — *Coolidge*, 403 U.S. 443; *Harris*, 403 U.S.C. 573; *Spinelli*, 393 U.S. 410; *Aguilar*, 378 U.S. 108 and *Ventresca*, 380 U.S. 102. The Fourth Amendment is equally applicable to the military court system as is the Fifth Amendment and other constitutional provisions. The Fourth Amendment, with its prohibitions against unreasonable search and seizure, becomes meaningless and unenforceable, unless written statements are utilized to secure search warrants. Apparently the military courts have long tolerated verbal statements, and the federal courts so far have not seen fit to interfere. It is time that this situation be corrected, and that the military courts toe the mark just as do any other courts of law.

CONCLUSION

This petition presents this Court with an appropriate opportunity to resolve certain open-end matters which are to be found in the Uniform Code of Military Justice. This Court does not have that many opportunities to do so, for court-martial cases reach the Supreme Court only after a collateral attack in the federal court. Obviously the unavailability of a certiorari petition from a decision of the Court of Military Appeals limits the number of court martial cases that are presented for review by this Court.

This petition gives this Court the opportunity to speak with finality with regard to the appropriate independence of the military trial judge; the proper way for a motion for a new trial to be handled; the appropriate limitations to be accorded the application of Article 134 of the Uniform Code of Military Justice; the issue of whether unanimity of a jury vote should be required to sustain a conviction; and whether search warrants can be issued on the basis of oral and unsworn statements to investigators.

I submit that very few military court martial convictions present an appellate court with as many critical issues as does this one. If this Court were to grant certiorari as to this single petition, it would have the opportunity to answer many critical questions that need to be decided.

Respectfully submitted,

s/ H. Elliot Wales
Attorney for Petitioner

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APPENDIX A — JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November, one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. ALBERT W. COFFRIN,
District Judge Sitting by Designation.

LUIS A. LEBRON, JR.,

Plaintiff-Appellant,

v.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant-Appellee.

Appendix A — Judgment of the Court of Appeals

75-6054
75-6055

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *AFFIRMED*. See memorandum attached.

s/ Leonard P. Moore
LEONARD P. MOORE
United States Circuit Judge

s/ William H. Timbers
WILLIAM H. TIMBERS
Unites States Circuit Judge

s/ Albert W. Coffrin
ALBERT W. COFFRIN
United States District Judge
Sitting by Designation

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APPENDIX B — MEMORANDUM OPINION

LEBRON v. UNITED STATES SECRETARY OF THE AIR FORCE

MEMORANDUM

The Fourth Amendment requires that warrants issue only upon probable cause; it does not specify written affidavits or sworn testimony. Given the military's unique status within the federal judicial system, the engraftment of federal civil procedures upon military courts should not be mandated unless the military procedures are so capricious as to deny the serviceman a fair hearing. Appellant does not challenge either the accuracy of the Special Agent's information or the basic fairness of the procedures employed.

There is no authority for appellant's proposition that unanimity is required in military trials. Again, the special position of the military requires that its procedures be respected, save when they unavoidably clash with the Constitution. The Supreme Court has not held that unanimous juries are required for any particular tribunal.

APPENDIX C — OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed April 14, 1975

S.D. of N.Y.

LUIS A. LEBRON, JR.,

Plaintiff,

v.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

74- CIV. 4942 (MP)
74 CIV. 4943 (MP)

APPEARANCES:

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PAUL J. CURRAN
United States Attorney for the
Southern District of New York
By: Daniel J. Pykett, Esq.
Asst. United States Attorney

MILTON POLLACK, District Judge.

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Appendix C — Opinion of the District Court

Cross-motions for judgment are before the Court. No factual issues are presented.

Plaintiff, an Air Force serviceman, seeks relief from two separate convictions by military courts martial. In one case, on January 12, 1971, he was found guilty of possession and use of a narcotic drug. In the other case, on December 17, 1971, he was found guilty of assault. Both complaints assert jurisdiction under 28 U.S.C. §§2251-54, the habeas corpus provisions, and 28 U.S.C. §1346, which authorizes suits against the United States in federal courts. Both suits were transferred to this District from the District of Columbia pursuant to 28 U.S.C. §1404(a) because the petitioner was found to be "in custody" in this District since he was paroled in the Bronx on probation.[1]

The authority of this Court to hear petitions for habeas corpus supports this proceeding in respect to the assault case since the complaint was filed while the plaintiff was either in prison or on probation. See 28 U.S.C. §2241(c). However, he was not in such "custody" when the complaint was filed pertaining to the narcotics case. Under certain circumstances where merits have been established, jurisdiction of the Courts to review a court martial decision has been found proper, even though habeas corpus jurisdiction would not lie because the plaintiff was not in custody. *United States ex rel. Flemings v.*

1. A petitioner who is released from jail on probation is still in custody for habeas corpus purposes. *Jones v. Cunningham*, 371 U.S. 236 (1963).

Chafee, 458 F.2d 544 (2d Cir. 1972), *rev'd on other grounds sub nom. Warner v. Flemings*, 413 U.S. 665 (1973).[2]

I. Narcotics Case

A court martial convicted plaintiff of violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934. He was sentenced to 6 months incarceration, forfeiture of part of his pay, and reduction in rank. Plaintiff contends that so far as concerns the narcotics case asserted against him the Article is unconstitutionally vague.

Article 134 authorizes court martial for "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to [the military code] may be guilty", which are not specifically mentioned in the Code of Military Justice.

In *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring), it is expressly stated that drug offenses are "of a sort which ordinary soldiers know, or should know, to be

2. *See also Williams v. Froehlke*, 356 F. Supp. 591 (S.D. N.Y. 1973), aff'd 490 F.2d 998 (2d Cir. 1974), which found jurisdiction to issue mandamus to overturn a court martial decision; *Melvin v. Laird*, 365 F. Supp. 511 (E.D.N.Y. 1973), which asserted jurisdiction to issue mandamus orders or declaratory relief under 28 U.S.C. §1346. Relief was ultimately denied on the merits in each case. *Compare Secretary of the Navy v. Avrech*, 42 U.S.L.W. 5233 (U.S. July 8, 1974), where the Supreme Court refused to decide "the difficult jurisdictional issue", of whether federal courts could review military courts in non-habeas actions, without the benefit of further argument, assumed jurisdiction, and dismissed the suit on the merits.

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punishable" albeit not set out in the words in the statute.[3] *Parker* holds that Article 134 is not so vague on its face as to allow it to be overturned at the instance of one whose offense was clearly within its reach.

Plaintiff further contends that the search warrant pursuant to which the contraband drugs were found in his possession was invalid, because it was issued on unsworn statements of a narcotics agent and because those statements were based on false statements of a fellow airman. Neither objection is meritorious. Authority to search may be granted upon oral and unsworn statements of a special agent under military law.[4] As to the allegations that the agent's representations were predicated upon false statements of another airman, it need only be noted that a warrant is properly granted if it is found that "the affiant-agent has reasonable grounds for believing in the truth of" the allegedly false statement. *United States v. Perry*, 380 F.2d 356, 358 (2d Cir. 1967). Plaintiff does not allege that such reasonable grounds did not exist, and it appears from the trial record that the trial court sufficiently dealt with the question of the validity of the search warrant.

There are no grounds established to sustain the relief plaintiff seeks in respect to the narcotics case. The military courts have dealt fully and fairly with the allegations raised by this petition and non-habeas relief is foreclosed. 10 U.S.C. §876; *United States v. Carney*, 406 F.2d 1328 (2d Cir. 1969).

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3. *See Schlesinger v. Councilman*, 43 U.S. L.W. 4432 (U.S. Mar. 25, 1975), where a petition for collateral relief from a court martial proceeding for possession of marijuana, to be prosecuted as a violation of Article 134, was held improperly granted. The Court noted at 4433 n.3 that petitioner there made no charge of vagueness or overbreadth.

4. *See, e.g. United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. McFarland*, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970).

II. Assault Case

Plaintiff seeks relief from a conviction of assault by an Air Force court martial under Military Law. Code of Military Justice. Art. 128, 10 U.S.C. §928. Subsequent to his conviction by the trial court and before its affirmance by the commanding officer of the post,[5] plaintiff came forward with new evidence, a confession of a third party of commission of the crime for which plaintiff was convicted. Plaintiff's attorney informed the post's commanding officer of the confession, and the latter ordered an *ex parte* investigation into plaintiff's allegations. After considering the record and the results of the investigation, the commanding officer approved the findings of court martial.

Plaintiff then applied to the Judge Advocate General for a new trial, and he, pursuant to 10 U.S.C. §873, referred the application to the Air Force Court of Military Review, before which plaintiff's appeal was pending. Under Military Law, 10 U.S.C. §873, consideration of newly discovered evidence for purposes of deciding whether a new trial should be granted is given to the Judge Advocate General; if the party seeking a new trial has an appeal pending before either the Court of Military Review or the Court of Military Appeals, the motion for a new trial is referred for decision to the Court considering the appeal. Here the Air Force Court of Military Review, after considering the trial record and the *ex parte* investigative report prepared for the commandant, denied the motion for a new trial.

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5. As convening officer of the court martial, the commandant has the responsibility to review the trial court's decision and, if he agrees with it, to affirm the trial court's decision. 10 U.S.C. 864.

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The plaintiff contends that due process was violated because the application for a new trial was not referred to the court martial trial judge for his consideration. Alternatively, it is contended that the statutes which fail to require the reference to the trial judge of a motion for a new trial are constitutionally deficient. Plaintiff's contentions on this point cannot be sustained.

Before considering whether the new trial motion was disposed of by procedures of the military which satisfy the requirements of the constitution, it is necessary to deal with a point which defendant raises. Defendant contends that there is no constitutional right to a new trial in the first place, so that any efforts by the Air Force to grant a new trial are gratuitous and thus not subject to challenge on constitutional grounds. Research has yielded very little law on this subject, though the legal encyclopedias support defendant's view that there is no constitutional right to a new trial. *See, e.g.*, 16 Am. Jur. 2d *Constitutional Law* §583: "Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings."; *accord*, 58 Am. Jur. 2d *New Trial* §15. *Whitley v. Superior Court*, 113 P. 2d 449 (Sup. Ct. Cal. 1941), holds that there is no constitutional right to a new trial in a civil case.

Even assuming that the Constitution does not guarantee such a right in a criminal case, once the right is granted by statute a denial of due process may be found, apparently, if there are deficiencies in the way the right is implemented. *Compare Griffin v. Illinois*, 351 U.S. 12 (1956), holding that, while there is

no constitutional right to an appeal of a criminal case in a state court, once the right is granted it is subject to the strictures of due process and equal protection (indigent's right to trial record for appeal). *See also Burns v. Ohio*, 360 U.S. 252 (1959) (unconstitutionality of filing fee for appeal as to indigents). *Douglas v. California*, 372 U.S. 353 (1963) (right to appointment of counsel on appeal). It should be noted, however, that while these decisions were purportedly based on both the due process and equal protection clauses, the denial of equal protection to indigents seemed to be the determining factor in each. There does seem to be a strong argument that here, where the Military Code mandates "action" by the appropriate appellate court, after referral from the Judge Advocate General, on a new trial petition, the court's action must comport with constitutional standards.

An analysis of whether the procedures that were utilized in this case satisfy the Constitution though the motion for a new trial was not referred to the trial judge for action must consider how the plaintiff herein would be benefited by having the trial judge act on his motion. The benefits to him seem to be the following:

(a) The trial judge is familiar with the evidence introduced at trial, has been able to judge the credibility of the various witnesses, and is best able to evaluate the possible effect of the new evidence.

(b) The trial judge can be counted upon to be impartial and to utilize fair and effective fact-finding procedures to test the validity of the new evidence.

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Under the military justice system the trial judge was not available to consider the new evidence, the court martial's jurisdiction having terminated at the rendering of its decision. *See Jackson v. Taylor*, 353 U.S. 569 (1957), which approved the resentencing of a defendant by the appellate body instead of remanding the case to the court martial: "A court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of the military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded." (at 579)

Defendant analogizes this situation to the expiration of the term of a trial judge. In the latter case, defendant contends that there is no arguable constitutional requirement that the judge who presided at trial decide the motion for a new trial if it comes after the expiration of his term. Defendant points out that the Supreme Court has authorized federal courts in habeas corpus proceedings to decide the sufficiency of evidence to show constitutional violations warranting a new trial. *Townsend v. Sain*, 372 U.S. 293, 317 (1962). Thus, defendant argues, the Court has recognized that motions for new trials need not always be heard by the trial judge.

Clearly, it is preferable for the judge who heard the evidence at trial, as opposed to another judge, to hear the motion for a new trial, as he thus "may utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion" in making his determination. *Brown v. United States*, 333 F.2d 723, 724 (2d Cir. 1964). It could be argued that motions for new trials may be permissibly heard by someone other than the trial

judge only where extraordinary circumstances mandate. Thus, arguably, the military's procedure for deciding new trial motions violated the accused's right to due process since it precluded a hearing before the trial judge even where such a hearing would be feasible.

Defendant points to *Gusik v. Schilder*, 340 U.S. 128 (1950), where a petitioner for habeas corpus relief from a court martial conviction was required to petition the Judge Advocate General for a new trial in order to exhaust his military remedies before coming to the federal courts. Defendant suggests that *Gusik* was a *sub silentio* approval of the military system for handling new trial motions. However, the adequacy of the system was not passed upon by the Court in that case.

The procedure by which the convening authority and the appellate court ascertained or sought to ascertain the factual basis and background for the new trial motion — the *ex parte* investigation — does not comport with generally accepted judicial methods for arriving at the truth. Two omissions present themselves in particular: (1) the failure to hold an evidentiary hearing at which plaintiff could present proofs and for which he would have the benefits of compulsory process, and (2) the failure to allow plaintiff's counsel to cross-examine those witnesses interviewed by the investigator upon whose report both the convening officer and the appellate court relied.

(1) There is no requirement that an evidentiary hearing be held whenever a defendant moves for a new trial. *See, e.g., United States v. Catalano*, 491 F.2d 268 (2d Cir. 1974). *Compare*

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United States ex rel. Conomos v. LaVallee, 363 F. Supp. 994 (S.D.N.Y. 1973), where a habeas corpus petitioner had sought a hearing in state court on his motion for a new trial on grounds of newly discovered evidence and the hearing had been denied. The federal court found that the denial raised no constitutional issue since the purported new evidence "obviously" was not newly discovered. There is no requirement of a hearing even where the judge considering the motion is not the one who presided at the original trial. *United States v. Persico*, 339 F. Supp. 1077 (E.D.N.Y.), *Aff'd* 467 F.2d 485 (2d Cir. 1972), *cert. denied* 410 U.S. 946 (1973).

Refusing to grant a hearing has, however, been held an abuse of discretion where a third party has confessed to the crime for which the defendant was convicted. In *Casias v. United States*, 337 F.2d 354 (10th Cir. 1964), it is said that: "No one can doubt that a confession by another party to the crime for which the petitioner has been tried and convicted, if discovered after conviction, would be grounds for a new trial. The integrity of the confession is a matter within the province of the trial Court. . . . We hold only that the petitioner is entitled to be heard on his motion, and the case is accordingly remanded for that purpose." (at 356)

Similarly, in *DeBinder v. United States*, 303 F.2d (D.C. Cir. 1962), the Court said at 204:

> The credible confession of another to the commission of a crime for which an accused has been convicted is, of course, sufficient ground for

> a new trial. . . . This "confession" should be tested in open court. [The alleged confessor] should be given the opportunity to appear and testify at a hearing on appellant's motion for a new trial.

Older cases, however, hold that such confessions do not of themselves justify a new trial, even if believed. *See, e.g., Hauck v. Hiatt,* 141 F.2d 812, 813 (3rd Cir. 1944), stating in such a situation that "if [petitioner] can demonstrate his innocence, his application should be to the President of the United States for executive clemency." *Accord, Figueroa v. Saldana,* 23 F.2d 327 (1st Cir. 1927). *Cf. McGuire v. Hunter,* 138 F.2d 379 (10th Cir. 1943).

It can be argued that the newer decisions are more consonant with modern law's elevation of justice over form, but there is still an open question whether what amounts to an abuse of discretion by a trial judge in refusing to grant a hearing on a new trial motion brought pursuant to Rule 33, Fed. R. Crim. P., would constitute a denial of due process by a tribunal not subject to that rule.

(2) Where a hearing is not held on a new trial motion, judges usually rely upon affidavits or depositions to resolve the factual issues presented. An *ex parte* investigation by a judge on a motion for a new trial has been characterized as "[s]o fraught with possible injustice and peril to the rights of a party" as to be reversible error where the investigation partially influenced the judge's decision. *Gordon v. United States,* 178 F.2d 896, 901 (6th

Cir. 1949), *cert. denied*, 339 U.S. 935 (1950). (In *Gordon* the District Court's decision was sustained on other grounds.) Similarly, it has been held error for a judge to take oral testimony on a motion for a new trial and not allow the defendant to cross-examine the witness. *State v. Ward*, 135 Wash. 485, 238 P. 11 (1925).

While it may be argued that the failure of the military authorities to utilize normal judicial adversary proceedings in ascertaining the facts behind plaintiff's motion for a new trial is a denial of his right to due process of law guaranteed by the Fifth Amendment, there is no authority to support this proposition directly. The failure to allow plaintiff's counsel to participate in the fact-finding procedure does, however, at least arguably violate plaintiff's Sixth Amendment right to the assistance of counsel under the language of *United States v. Wade*, 388 U.S. 218, 224 (1967), which interpreted that amendment to require that a criminal defendant's counsel be present at all "critical stages of the proceedings". (There counsel were required at pre-trial line-ups.) It can be argued that the fact-finding process upon which a motion for a new trial is decided is such a "critical stage".

The argument that the new trial motion should have been considered by the trial judge because of his trial experience and that failure to have the motion considered by the trial judge is thus a violation of due process does not seem convincing in light of the authorities. There is no authority that failure to hold an evidentiary hearing on the motion in these circumstances is a violation of due process, though there is some authority that it

would be an abuse of discretion for a judge subject to Rule 33, Fed. R. Crim. P. The argument that the reliance of the decision-makers here upon an *ex parte* investigation to resolve the factual issues is a denial of due process and a violation of plaintiff's Sixth Amendment right to counsel has superficial plausibility only, since motions for a new trial may be decided without an evidentiary hearing.

Since the issue before this Court is whether the procedure by which the new trial motion was considered was proper, rather than whether plaintiff should have been granted a new trial, a hearing on the question of whether he should be given a new trial would not be warranted.

Other grounds urged by plaintiff for overturning his assault conviction are also without merit. His contention that the conviction must be set aside because he was found guilty by a non-unanimous jury cannot be sustained. Plaintiff points to *Johnson v. Louisiana*, 406 U.S. 356 (1972), in which the Supreme Court, by a 4-1-4 vote, affirmed the constitutionality of non-unanimous juries in state criminal proceedings. Mr. Justice Powell in concurrence indicated that he would decide differently if the Court were considering federal trials, thus providing a five man majority which would hold non-unanimous federal jury convictions to be unconstitutional. However, Justice Powell predicated his view upon the theory that the Sixth Amendment in its entirety did not apply to the states. The Sixth Amendment right to a jury trial does not apply to military courts, *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950). Thus it would seem to follow from the view expressed in *Johnson* that Justice Powell

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could not be expected to hold that unanimous juries are constitutionally required in military courts.

Plaintiff contends that the line-up in which he was first identified by the victim of the assault was improperly suggestive. Assuming *arguendo* that he is correct, the applicable test is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Many different factors must be considered in determining the reliability of an identification, *Neil, supra*, at 199-200, and the determination is best made by the trial judge who has seen and heard the witnesses. For that reason, resolution of this question upon habeas corpus review "marks the rare exception." *United States ex rel Phipps v. Follette*, 428 F.2d 912, 916 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Here the trial judge gave the plaintiff the opportunity to object to the line-up at a hearing held before the jury was brought in; plaintiff declined to do so.[6] Plaintiff was allowed to examine the man who was responsible for the line-up in some detail at trial, in an apparent attempt to discredit the identification in the minds of the jury.[7] Under these circumstances, it would not be appropriate for this Court to now consider *de novo* the question of the validity of the identification made at and subsequent to the line-up.

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6. Court martial transcript at 21. The transcripts of both courts martial were submitted to this Court and have been considered for the purposes of this opinion.

7. Transcript at 163 and following pages. See also transcript at 316-18. Defense counsel argued the suggestiveness of the line-up procedure to the jury during his summation. Transcript at 358-59.

The two complaints in this case are dismissed. Plaintiff's motions for summary judgment are denied. Defendant's cross-motions for judgment in his favor on the pleadings are granted.

SO ORDERED.

April 14, 1975

s/ Milton Pollack
U.S. District Judge

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